Before The
Federal Communications Commission
Washington, D.C. 20554

In The Matter Of	)	
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211

REPLY COMMENTS OF WIREFREE PARTNERS III, LLC

Wirefree Partners III, LLC ("Wirefree III") respectfully submits its reply comments in response to comments filed on the Further Notice of Proposed Rulemaking in the above-referenced proceeding (the "Further Notice"). The comments reflect the deep disagreement within the industry on: (1) whether there is a problem with the Commission's rules to promote small business participation in spectrum auctions; and (2) the appropriate standard for assessing designated entity ("DE") eligibility. In their attempt to draw arbitrary and unsupported distinctions, many parties' comments plainly reveal their interest in having the Commission adopt rules to fit their particular needs. The consequence of such an approach will be a reduction in the number of DEs that can raise capital and participate in the AWS auction.

Wirefree III urges the Commission to recognize that there is no one formula for small business success and to provide DEs with the maximum flexibility to structure their businesses and their commercial relationships. The Commission also should recognize that the concerns about "control" do not apply to long term spectrum manager leasing. Rather than create rules that draw arbitrary distinctions with no record or factual basis, the Commission should stringently apply the existing standards of *de facto* and *de jure* control to all DEs and their "relationships". In addition, on the only two issues on which a general consensus has evolved,

the record supports quick action on the Further Notice by the Commission to prevent a delay in the AWS auction and the Commission's use of its existing unjust enrichment rules for AWS licensees.

I. The Concerns Raised by Proponents of the Rule Changes Do Not Apply To Spectrum Manager Leasing

Long term spectrum manager leasing entered into in accordance with the Commission's rules does not implicate any of the concerns of undue influence or control raised in the comments filed by those seeking to change the DE rules for Auction 66. The ability to lease a portion of their licensed spectrum, however, does provide DEs access to capital that DEs can use to acquire spectrum and deploy their own, independent networks.[1]

Pursuant to the Commission's rules, spectrum manager leasing, by definition, requires that the licensee/lessor maintain *de facto* and *de jure* control over the spectrum. The Commission has already determined that DEs can properly structure long term spectrum manager leases with third party lessees without losing their eligibility as a DE.[2] There is no reason to revisit this decision. In licensing a DE, the Commission applies its existing attribution rules, including the definitions of controlling interest and affiliation, to determine whether a licensee undertaking a lease has maintained its designated entity and/or entrepreneur eligibility. The Commission's application of these rules and review of the lease agreements during the

[1] Parties citing Wirefree III's decision to lease a portion of its licensed spectrum to subsidiaries of Sprint Nextel ignore the fact that Wirefree will use the non-leased spectrum to deploy its own network. The failure to provide a complete picture of Wirefree III's structure and business is misleading. *See, e.g.*, Comments of the Minority Media and Telecommunications Council ("MMTC") at 6.

[2] Promoting Efficient Use of Spectrum Through Elimination of Barriers To the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17541-17542 (2004) ("*Secondary Markets Order"*).

licensing process, ensures that any spectrum lease agreement between a DE and third party lessee is arms-length and does not rise to the level of affiliation or a controlling interest.

Council Tree seeks to have the Commission disqualify from eligibility DEs that enter into long term spectrum manager leasing with select carriers without providing any evidence that this form of leasing has led to abuse or control by third party lessees. Indeed, the alleged justification cited by Council Tree for restricting commercial relationships between DEs and a few "large" wireless carriers simply does not apply to long term spectrum manager leasing.[3] Council Tree speculates that only nationwide carriers by virtue of any relationship with a DE will see their "influence extended in terms of geography, spectrum depth, technological reach, and marketing exposure".[4] This is not true in long term spectrum manager leasing where the DE runs its own network and leases only a portion of its spectrum to a third-party. In spectrum manager leasing, the licensee and lessee's relationship is defined by the spectrum manager lease and does not extend to agreements on technology, marketing or network deployment or involve equity investments or control.

The current rules for spectrum manager leasing by DEs adequately protect against the undue influence of the third party lessee. Long term spectrum manager leases do not allow a lessee to control the licensee/lessor's use of the spectrum. The Commission's guidance to DEs considering leasing a portion of spectrum outside their own network operations require that DEs have full and unfettered use of spectrum for their own networks. Since the *Secondary Markets*

[3] Council Tree itself previously supported rules that would allow DEs, and especially Alaska Native Corporations and Indian Tribes, to lease **all** of their spectrum to third parties. In the Secondary Markets Proceeding, WT Docket NO. 00-230, Council Tree argued against adoption of restrictions on leasing by DEs: "If unjust enrichment rules were intended to encourage those benefiting from special measures to retain their licenses and to participate in the provision of spectrum-based services, **that purpose is served by allowing them to participate in the Commission's secondary markets for spectrum alongside other licensees**." *See* Council Tree *Ex Parte*, WT Docket No. 00-230, filed December 29, 2003 (emphasis added).

[4] Council Tree Comments at 29.

Order, all DEs have been on notice that a spectrum manager lease could create an attributable affiliation if a lease called for the licensee and spectrum lessee to combine their efforts, property, money, skill and knowledge.[5] Accordingly, the Commission's existing rules already prohibit a DE who elects to enter into a spectrum manager lease from becoming a mere extension of a lessee's operations.

II. The Comments Reflect A Deep Disagreement About the Need for Changes to the DE Rules

a. Many DEs Have Raised Their Own Capital

The Comments reveal deep disagreement between the parties on the history and success of DE licensees and the Commission's rules. The record reflects that many DEs have raised and contributed their own capital to pursue wireless opportunities in PCS. Wirefree III is self funded and raised $150 million of its own debt and equity for Auction 58 without a large carrier equity investment. Cook Inlet contributed $80 million of its own capital to its ventures in PCS.[6] Rural telephone companies, who have relationships with the large carriers that would qualify as "material" under the proposals by Council Tree, are providing service in their own markets. The DE licensees from Auction 58, who Council Tree seeks to pre-judge, just recently received their licenses that were paid for in full.

Despite these DE success stories, and ***without*** any evidence of defaults, rule violations, undue influence, or competitive harm, Council Tree seeks to rewrite the stories of each of these companies to fit its own purpose and to restrict these companies from competing against Council Tree or its affiliates in Auction 66. The Commission should not adopt changes to its DE rules that ignore the full record of both DE successes and failures.

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[5] *Secondary Markets Order* at ¶ 76.

[6] Cook Inlet Comments at 20.

b. Prior Auctions that Produced a Wide Dissemination of Licenses Have Also Produced Significant Defaults and Business Failures

The business failure rate of DEs is likely to be exacerbated if the Commission restrains commercial relationships between DEs and carriers even when those relationships do not implicate control. In prior auctions that included incentives for DEs and spectrum set asides, DEs won a significant amount of licenses but also experienced a significant amount of business failures.[7] These failures conveniently are overlooked by those promoting restrictive rules for DEs that are destined to limit most DEs' access to capital by banning even commercially reasonable transactions.

The record in this proceeding would be incomplete without any acknowledgement of the struggles faced by DEs in PCS even with the set aside blocks and installment financing. With rare exceptions, such as Cook Inlet, bidders and licensees in the C and F block have failed at least once. As the Commission is well aware, the largest C block PCS bidder, Nextwave, filed for bankruptcy. Leap Wirelesss, who accurately describes itself as the first successful DE to use the publicly traded company rule, filed for bankruptcy and was forced to reorganize.[8] Metro PCS' predecessor, GWI, was a licensee in the initial C block auction but filed for bankruptcy after it defaulted on its payment obligations to the FCC. It is now providing service as Metro PCS is certain markets using those licenses.[9] Ironically, it is these very companies that have experienced dire difficulties in running successful wireless companies that now support efforts to restrict DE participation in Auction 66. They seek to have the Commission draw boundaries

[7] The principals of Wirefree II participated in both the C block and F block auctions. Their company withdrew from the C block auction based on the high auction prices and honored all its payment obligations for its F block licenses.

[8] Leap Wireless Comments at 4.

[9] MMTC cites Leap Wireless and Metro PCS as examples of the success of the DE program without acknowledging the full history of these companies or providing a rational basis for exempting them from the same rules MMTC encourages the Commission to apply to a few carriers. MMTC Comments at 13.

around what constitutes a "bona fide" small business. Their support is no surprise since the rule changes they advocate would *not* apply to them or their partnerships with DEs but only would apply to their most significant competitors.[10]

In light of the incomplete and disputed record in this proceeding, the Commission should undertake a careful study of past auctions to develop a complete and objective record of the history of the DE rules and their effectiveness. The comments do not provide objective evidence or a full and complete evaluation of the need for different auction rules. The comments also clearly reveal there is no consensus on the best approach to continuing to create opportunities for small businesses in spectrum auctions and implementing the mandate of Section 309(j) of the Communications Act.

III. The Record Does Not Demonstrate A Concrete Problem Or Support The Distinctions Between Certain Wireless Carriers and Other Companies

There is no rational basis for the adoption of rules in this proceeding that target and discriminate against only wireless carriers that have deployed nationwide networks and generated significant subscriber revenues.[11] The comments filed do not provide a factual or rational basis for distinguishing between DEs who have non-controlling relationships with the wireless carriers Council Tree suggests be defined as "large" and other entities.[12] Indeed, in the same comments, parties who support the restriction on "large" wireless carriers oppose applying the same restriction to equally large companies and to other in-region wireless carriers that meet

[10] Metro PCS has indicated to the Commission that it will participate in Auction 66 possibly through a DE investment. See *Ex Parte* filed by Metro PCS, February 10 2006, at 2. Leap notes in its comments that it participated in Auction 58 through a "joint venture" with Alaska Native Broadband. Leap Comments at 2.

[11] As T-Mobile USA, Inc. correctly states, the proposed rules will have no impact on a DE arrangement between a large investor, such fund manager Mario Gabelli, and a DE – a relationship currently the subject of pending litigation. T-Mobile Comments at 7.

[12] *See, e.g.*, Comments of CTIA – The Wireless Association at 6-10, Cook Inlet Comments at 5-9, Comments of Verizon Wireless at 4-6.

Council Tree's definition of "small".[13] These distinctions are illogical and do not provide a sustainable basis for regulation or sound public policy.

The inconsistency of Council Tree's position and the arbitrary nature of its proposal to target nationwide wireless carriers while exempting all others are demonstrated by Council Tree's own reasoning. In its comments, Council Tree states:

> the Commission should not expand the scope of its prohibition to include other "entities with significant interests in communications services" because there is no demonstrated problem concerning entities with significant interests in communications services in this context.[14]

Council Tree continues to enunciate the required record for drawing distinctions between those it believes should be subject to prohibitions and those it believes should be free to invest in DEs and enter into material relationships:

> The Commission would be required to justify the distinctions that it crafts, based on objective evidence, and to articulate a rational connection between the facts found on the record of this proceeding and the choices made as a result thereof.[15]

Significantly, the comments filed fail to establish that there is a "demonstrated problem" with "large" wireless carriers entering into commercial transactions with DEs.[16] Furthermore, the comments fail to present any evidence, or provide any facts, that provide a rational connection

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[13] Leap Wireless (a carrier that would qualify as small) acknowledges in its comments that it participated in Auction 58 through a "joint venture" with Alaska Native Broadband – a DE. As the Auction 58 applications disclose, US Cellular, who would also be exempt from the proposed rules, had a material relationship with Caroll Wireless, LP in Auction 58 and Metro PCS, through GWI, had a material relationship with Royal Street Communications, LLC. None of these existing incumbent wireless carriers would be subject to the restrictions proposed by Council Tree.

[14] Council Tree Comments at 36.

[15] Council Tree Comments at 38.

[16] *See, e.g.*, Comments of CTIA – The Wireless Association at 6-10, Cook Inlet Comments at 5-9, Comments of Verizon Wireless at 4-6.

between objective facts in the record and adoption of the discriminatory rule changes advocated by Council Tree.[17]

IV. This is Not the Proceeding to Evaluate Competition in the Wireless Industry

Council Tree, through its comments, attempts to turn this proceeding into a referendum on the state of competition in the wireless industry and to reopen the AWS service rules. Those issues are not relevant to the DE rules to be applied in the AWS auction and should not be the subject of this proceeding. Council Tree attempts to cloud the issue that DEs must exercise *de jure* and *de facto* control over the licensee with aggregated statistics regarding the wireless industry. The statistics cited by Council Tree, and parroted in other filings, however, are misleading and have no bearing on the FCC's rules defining the boundaries for non-attributable investments in a DE or a DE's affiliates.

A close examination of the statistics summarized by Council Tree reveal that competition is alive and well in the wireless industry with five to ten carriers providing competitive wireless service offerings.[18] While not all wireless carriers have chosen to make the large scale investments required to deploy nationwide networks, the statistics shows that subscribers have gravitated towards nationwide wireless carriers as their carriers of choice resulting in higher revenue and subscriber numbers for these carriers. Rather than see the deployment of networks and offering of these services as responsive to consumer demand and in the public interest,

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[17] Council Tree continues to refine the distinctions it suggests the Commission draw in revised rules. In its comments Council Tree now suggests that rural telephone companies should be allowed to have marketing and management agreements with large carriers despite Council Tree's proposed complete ban on any material or financial agreements. Council Tree Comments at 53. Council Tree also seeks to permit roaming agreements (provided they are non-discriminatory which Council Tree acknowledges may be difficult to determine) and interconnection agreements. Council Tree Comments at 50-51. Council Tree's continued refinement and evolution of its proposals point to the difficulty in implementing the suggested rule changes and the self serving nature of its position.

[18] Also excluded from these numbers are wireless providers who offer competitive services by reselling the wireless network services of existing wireless carriers under their own brand and pricing plans commonly referred to as Mobile Virtual Network Operators ("MVNOs").

Council Tree attempts to cast the voluntary, free market choice by subscribers of a wireless carrier as something "controlled" by the carriers. Council Tree states that the top five carriers "control" their subscribers when nothing could be further from the truth.[19] Subscribers are free, and often do exercise their freedom, to choose the wireless carrier that best suits their needs as demonstrated by the fact that the top five carriers aggressively compete for subscribers and their revenue.[20] Despite pages of statistics and charts, Council Tree's analysis does not provide any evidence that these carriers have used their success improperly or to exert control over a DE or its operations.

V. The Commission Should Act Quickly To Prevent a Delay in the AWS Auction and Apply the Current Unjust Enrichment Rules to AWS

The comments produced a consensus only on two issues. First, the Commission should act quickly to adopt any rule changes to provide regulatory certainty and to avoid any delay in the AWS auction. In order for the auction start date of June 29, 2006 to be maintained the Commission must finalize the DE rules swiftly. The timing of the Further Notice has made it difficult for DEs to raise funds for the AWS auction; further delay will only add to the difficulties. Based on the record and stark disagreement between potential bidders, Wirefree III submits that the Commission should maintain its current DE rules for the AWS auction and defer any changes to the DE Rules for further study and future auctions.

Second, the comments generally support application of the current unjust enrichment rules in Part 1 of the Commission's rules to AWS. The Commission should clarify for bidders well in

[19] Council Tree Comments at 19, Chart 4.

[20] The Commission has expressly recognized this phenomenon, known as "churn" in the industry. See Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Services, *Tenth Report*, 20 FCC Rcd 15908, 15964 (2005) "[F]or every three new customers the national carriers bring in, they are losing two, on average … "

advance of the auction if these rules will apply.

Respectfully submitted,

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